

United States Court of Appeals FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

vs.

D.I. OPERATING CO.,

Add papers
Appellant,

3362
Appellee.

UNITED STATES OF AMERICA,

vs.

UNITED RESORT HOTELS, INC.,

Appellant,

Appellee.

UNITED STATES OF AMERICA,

vs.

DESERT INN OPERATING
COMPANY,

Appellant,

Appellee.

APPELLEES' PETITION FOR REHEARING

WILLIAM SINGLETON
Attorney at Law
109 South Third Street
Las Vegas, Nevada

J. A. DONNELLEY
Attorney at Law
2655 Fourth Avenue
San Diego, California

Attorneys for Appellees

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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| UNITED STATES OF AMERICA, |) | |
| |) | |
| Appellant, |) | |
| |) | |
| vs. |) | No. 20,293 |
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| D. I. OPERATING CO. , |) | |
| |) | |
| Appellee. |) | |
| |) | |
| |) | |
| UNITED STATES OF AMERICA, |) | |
| |) | |
| Appellant, |) | |
| |) | |
| vs. |) | No. 20,294 |
| |) | |
| UNITED RESORT HOTELS, INC. , |) | |
| |) | |
| Appellee. |) | |
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| UNITED STATES OF AMERICA, |) | |
| |) | |
| Appellant, |) | |
| |) | |
| vs. |) | No. 20,295 |
| |) | |
| DESERT INN OPERATING COMPANY, |) | |
| |) | |
| Appellee. |) | |
| |) | |

TO THE HONORABLE:

Frederick G. Hamley, Circuit Judge

Charles M. Merrill, Circuit Judge

J. Warren Madden, Judge of the Court of Claims

Appellees hereby petition for a rehearing en banc to reconsider the judgment entered in the above-entitled cause on June 9, 1966, on the following grounds:

1. Appellees believe that this Court in deciding the case overlooked controlling matters of law in that this Court, by its interpretation of the words "conducted for profit", has imported for the first time into the wagering tax statute an element of vagueness and fluidity which makes the constitutionality of the statute doubtful.

Chapter 35 "Taxes on Wagering" is completely cohesive, consisting of Sections 4401 to 4423, inclusive. Section 4413 makes the \$50 occupational tax imposed by Section 4411 a condition precedent to engaging in that business; Section 4414 imposes civil and criminal penalties on offenders by specific reference to subtitle F; Section 4421 defines wagers, which definitions form the basis for the imposition of the civil and criminal sanctions referred to in Section 4414.

The Committee Reports dealing with the wagering tax (Sen. Rep. No. 781, 82nd Cong., 1st Sess. 1951-2 Cum.Bull. pages 458, 540, 542 and 543) clearly establish the intention of the Senate to make criminal penalties applicable.

Section 7262 (subtitle F of the Internal Revenue Code) provides for fines of not less than \$1,000 and not more than \$5,000 in addition to the payment of the tax. Neither willfulness nor intent is required in order to make the penalties of

Section 7262 applicable.

This court at page 5 of the slip opinion is guided in its interpretation of the words "conducted for profit" by the interpretation of the words "performance for profit" in the copyright statute. It says that "the potential reach of the phrase 'conducted for profit' would appear at least as wide as that of 'performance for profit.' " (Emphasis supplied.) If it can be "at least as wide" it can be wider. To say that the reach of a statute levying an excise tax, the definitions of which are used for imposing criminal sanctions can be even wider than the reach of the copyright statute, which affords the maximum protection to the owner of the copyright, is to say that the Government has no bounds in determining when it may impose the precondition of the \$50 occupational tax and the posting of the occupational stamp before a wagering pool may be conducted. This robs the statute of the definiteness required to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute and may subject him to criminal penalties.

In United States v. Harriss, 347 U. S. 612 (1954), the Supreme Court said at 617:

"The constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute. The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed."

In United States v. Cardiff, 344 U. S. 174 (1952) the Court said at 176:

"* * * The vice of vagueness in criminal statutes is the treachery they conceal either in determining what persons are included or what acts are prohibited. Words which are vague and fluid* * * may be as much of a trap for the innocent as the ancient laws of Caligula."

Furthermore, because this statute is the basis for the imposition of criminal and civil sanctions, if the statute is, as this Court says on page 5 of its slip opinion, "not so clear and unambiguous", its constitutionality is now in doubt.

After the briefs in this case were filed the Supreme Court on March 21, 1966, decided Malat v. Riddell, 86 S. Ct. 1030, which reversed a panel of this Circuit and held for the taxpayer in an income tax case. The Supreme Court said at 1032:

"As we have often said, 'the words of statutes--including revenue acts--should be interpreted where possible in their ordinary every-day senses.' " (Emphasis supplied.)

2. The Court has misread the Committee Reports and in doing so has overlooked controlling matters of law. Page 6 of the slip opinion states that:

"There is no question that the regulation was properly applied in this case. The committee reports accompanying the statute state that the tax was not meant to apply to the purely 'social' or 'friendly' type of betting pool sometimes organized among friends or other associates. * * * While the Desert Inn's calcutta was an invitation-only affair, it was hardly the kind of 'social' or 'friendly' pool whose exclusion from the tax was contemplated by Congress."

The Court has read the language from the Committee Reports dealing with a definition of a wager for purposes of what is now Section 4421 (1) (A) into Section 4421 (1) (B) which is the only section applicable to this case. The Committee Reports described the three types of wagers, now known as Section 4421 (1) (A) (B) and (C). In dealing with the wagers on sports events or contests in Section 4421 (1) (A), the Senate Committee Report on the page referred to in the slip opinion, said:

"Wagers on sports events or contests, to be taxable, must be placed with a person engaged in the business of accepting such

wagers. The purpose of this requirement is to exclude from tax the purely 'social' or 'friendly' type of bet. * * *

The slip opinion has completely overlooked the part of the Committee Reports, p. 540, dealing with said subsection (B), where specific examples of a wagering pool conducted for profit are given as follows:

"The requirement that the pool be operated for profit is designed to eliminate from the tax base those pools which are occasionally organized among friends or other associates, all of the contributions being distributed to the winner or winners. A pool would be considered as being operated for profit, if, for example, a person appropriated to himself a percentage of the amount contributed to the pool or required a fee for the privilege of contributing to the pool."

Desert Inn's wagering pools were expressly excluded from the wagering tax by the language of the statute and of the Committee Reports. Webster's Unabridged New International Dictionary, Second Edition, defines "associate" as "one associated with another * * * by a community of interest." The undisputed facts are that the participants in this pool were clearly associated by a community of interest. The pool was occasionally organized, once a year. All the contributions were distributed to the winners and on their behalf to the Fund. No direct or indirect admission fee was charged the participants.

3. The holding of the Court in this case has developed an intra-circuit conflict. This Court says in effect on page 5 of the slip opinion that since there were two lines of cases presented defining the words "for profit" -- one the excise tax cases requiring a strict construction of a direct profit, and the copy-right cases requiring a broad construction -- the wagering tax is not clear and unambiguous.

The Court in doing so ignored its own en banc decision in Fisher Flouring Mills Co. v. U.S., 270 F.2d 27 (1959), wherein it held that excise tax statutes were to be strictly construed and held a Treasury Regulation invalid. In Fisher the Court said at page 31:

"This Court has applied the rule of these authorities:

" 'The intention of the Congress is to be sought for primarily in the language used, and where this expresses an intention reasonably intelligible and plain it must be accepted without modification by resort to construction or conjecture. ' "

4. In the event that a rehearing is granted, Appellees desire to reargue the applicability and controlling influence of the cabaret tax cases and to suggest that the Court has misread the pre-1942 cabaret tax statutes.

5. A rehearing is not sought in respect of any other questions.

6. It is respectfully suggested that it would be appropriate for this case to be heard en banc to the end that it may be determined whether the interpretation by this Court in the slip opinion of the language of the statute affects its constitutionality and also whether or not the opinion has caused an intra-circuit conflict to exist.

Respectfully submitted,

WILLIAM SINGLETON
J. A. DONNELLEY

/s/ J. A. DONNELLEY

Attorneys for Appellees

CERTIFICATE OF COUNSEL

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I, J. A. Donnelley, one of the attorneys for the Appellees, certify that in my judgment this petition is well founded and that it is not interposed for delay.

/s/ J. A. DONNELLEY

